IN THE OFFICE OF THE OMBUD FOR FINANCIAL SERVICES PROVIDERS

PRETORIA

Case No: FAIS 06003/12-13/ GP1

In the Matter Between:

ANITA VERA VERMAAK **Complainant**

And

BECKER FINANSIELE ADVISEURS BK **First Respondent**

JACO BECKER **Second Respondent**

DETERMINATION IN TERMS OF SECTION 28(1) OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT NO 37 OF 2002 (the Act)

A. INTRODUCTION

[1] Complainant invested her pension funds in PIC Syndications (Pty) Ltd, Highveld Syndication No. 20 (PIC). Respondents, in particular second respondent, was complainant's financial services provider (FSP) who advised her to make the investment in PIC. The investment was made in December 2007 in an amount of R650 000. Since

about October 2012, complainant stopped receiving her monthly returns and nor did she receive any part of her capital. She was unable to find any assistance from respondents and filed a complaint with this office.

B. THE PARTIES

[2] Complainant is Anita Vera Vermaak, a 67-year-old pensioner who resides in Centurion Pretoria.

[3] First respondent is Becker Finansiële Adviseurs BK**,** a close corporation duly registered (having registration number 1996/043707/23) of Erasmuskloof. First respondent is a licensed FSP with FSP No 15442.

[4] Second respondent is Jaco Becker who is the Key Individual of first respondent and represented the latter in marketing the financial product relevant to this complaint. At all material times, second respondent provided complainant with financial advice. I will refer to both respondents as "respondent" unless the context calls on me to distinguish between them.

C. THE COMPLAINT

[5] Respondent was retained by complainant as her FSP after he assisted her mother with her financial portfolio. Respondent sold her house in Rustenburg and mandated respondent to invest an amount of R2,2 million. Respondent invested the funds through Momentum in a diverse portfolio.

[6] Thereafter complainant purchased a small house for herself in Centurion. After this purchase, respondent advised complainant to invest in Picvest as it "*had a guaranteed*

income of 10% interest for at least five years." Respondent added that it would be the safest investment for the remaining part of complainant's available funds. Respondent explained that there was a buy-back agreement in place and that the capital was guaranteed growth of 100%. Respondent explained that the effective date for the buyback was 1 May 2009. Respondent also stated that all costs including commission will be paid by the promoter. On respondent's advice, complainant agreed to invest in PIC and on the 3 December 2007, invested her remaining funds in an amount of R650 000.

[7] After the investment was made, complainant received her promised interest payments on a monthly basis. Complainant relied on these payments to maintain herself. In March 2011, complainant stopped receiving her monthly payments from PIC. She contacted respondent who was evasive and offered no explanation but advised her to listen to a program on a local radio station, RSG. After listening to the show, she realised that the problem was more serious than she thought.

[8] Complainant points out that she explained to respondent that she was a single woman who depended on the income from the investment. She points out that respondent was familiar with her financial circumstances when he advised her to invest in PIC.

[9] As at January 2007, complainant had invested her funds with Momentum and provided a statement from the latter. Of significance is that her funds were in a diverse portfolio made up of investments in Alan Gray Stable Fund, Coronation Capital Plus, Nedgroup Investments Rainmaker Fund, RMB Balanced Fund and RMB Money Market Account. Her investments totalled R2.1 million. She purchased a house for herself from these funds and the remaining funds were invested in PIC.

[10] Complainant states that she received no assistance from respondent after her income stopped and she was advised to file a complaint with this office.

[11] Her principal complaint is that respondent well knowing her financial circumstances, moved her funds from conservative investments in Momentum, to an inappropriate and high-risk investment in PIC. But for respondent's advice she would not have invested in PIC. It is not in dispute that at the time of making the investment, she had no knowledge of investments in property syndication. Respondent was aware of this.

[12] Complainant forwarded all the documentation available to her including correspondence from PIC advising her of the business rescue process.

D. RESPONSE

[13] The complaint as well as all the documents were referred to respondent for his response. A written response was received by this office coupled with supporting documents. I will set out respondent's response and provide my findings. I will do so with reference to the available documentation.

How the Investment was Made

[14] Respondent met complainant in January 2007 and certain financial needs were identified. At that time complainant needed a short to medium term investment. Complainant's reason was that she would soon require her funds to purchase property and a motor vehicle. Respondent advised her to invest R2.2 million in a conservative unit trust portfolio with Momentum Wealth. Her income was R10 000 per month for the duration of the investment.

[15] In February 2007 complainant withdrew R150 000 from her funds and in November 2007 a further amount of R700 000 was withdrawn. From this amount, respondent recommended an investment of R650 000 in PIC. The purpose of this investment was to supplement her monthly income. According to respondent, at that stage, end of 2007, "*the volatility in the markets and the uncertainty in the economy, as well as the possibility of the capital value and income of unit trusts investments fluctuating, a PIC investment was an acceptable option".*

[16] This option suited her needs "*as indicated by herself"* that she required; firstly, a monthly income (10% with the potential to escalate annually) and; secondly, capital preservation after five years. Here respondent drew my attention to a document titled "Beleggingsvoorstel Vir Anita Vermaak" (investment proposal for Anita Vermaak) which was prepared by him after considering complainant's financial circumstances. This document is significant for the following reasons:

a) It was prepared in respect of the investment of R2.2 million made in Momentum and was prepared in January 2007. This document was not prepared regarding respondent's advice to invest in PIC;
b) It records that the available funds are R2.2 million and a monthly income of R10 000 was required;
c) It records that bearing in mind client's circumstances, an investment in unit trusts was recommended. Respondent notes that complainant has a conservative risk profile;
d) It contains an analysis of the investment climate at that time (January 2006) and points out that the JSE still delivered impressive results;
e) That listed companies performed well and delivered returns of about 15%;

f) Investments in property, over the past three years also provided good returns but the cost of capital is increasing and returns from property unit trusts will be lower than previous performance;

g) That a balanced investment in conservative unit trusts is recommended and will protect the funds from fluctuations on the JSE.

[17] Respondent's advice then was for her to invest in conservative unit trusts in Momentum Wealth. He accordingly invested complainant's funds totalling R2.2 million in Momentums conservative unit trust portfolio. Pausing here for a moment, I cannot fault respondent's advice. It was well thought out, compatible with complainants' financial needs and risk profile and entirely suitable for complainant. It was a low risk investment not likely to cause capital loss. Complainant was naturally happy with this advice.

[18] When the investment in PIC was recommended, complainant had an amount of about R1 300 000 in Momentum, this according to respondent. Regarding his advice to invest in PIC, respondent states as follows:

a) The terms and conditions of the product was explained to complainant "*as indicated in the prospectuses";*

b) No misrepresentations were made by respondent to complainant;

c) Respondent acted according to what was expected of him as an FSP by The Act; and

d) A risk analysis was done and signed by complainant; a copy is annexed.

[19] Respondent then explains that complainant, from December 2007 until October 2012 received an income totalling R276 599. 68. From April 2011 the interest rate was reduced to 6%.

[20] Respondent then informs that PIC Syndication (Pty) Ltd was placed under business rescue. But complainant's investment *"is still in place and there is no loss of capital".* He expresses the view that her capital will currently not be liquid until a "*resolution*" for PIC Syndication is found.

[21] Respondent then concludes by submitting:

a) That he acted as a representative of PIC where they accepted responsibility;

b) That complainant's predicament was not the result of bad advice from him but was caused "*because of the Highveld Syndication Companies having to amend their obligations to investors because of possible fraudulent activities which was beyond my control";*

c) That complainant should lodge her complaint against PIC Syndication (Pty) Ltd as product provider and its directors; and

d) That the nature of the complaints is product related and not within his control.

Financial Profile and Needs

[22] Respondent states that the object of the PIC investment was to provide monthly income. Respondents own documentation contradicts this. In the PIC application form, the source of funds is stated as "*Pensioen Momentum".* Complainant describes her investment need as "planning for retirement". In the application form, complainant repeats her investment goals as "Security, Income and Growth".

[23] It is not in dispute that after complainant purchased her house, there was R650 000 available from her original investment in Momentum. When she made the PIC investment, respondent knew that it was the sum total of her available funds. The funds were earmarked for her retirement and she wanted a reasonable income, security and capital

growth. Complainant made it plain that she was not in a position to lose any part of her investment. Respondent was aware of this.

[24] It is not disputed that in January 2007 respondent's assessment of complainant was that she was a "conservative moderate" investor. Respondent does not explain why in December 2007, notwithstanding that complainant's financial situation remained unchanged, he saw fit to advise her to invest in a high-risk investment such as PIC. In fact, in December 2007, complainant had even less funds to invest after she bought a house and exhausted her Momentum investment.

[25] On respondent's own version, he advised complainant to invest in a product that was not suitable for her financial needs and tolerance for risk. I draw attention to the prospectus, which respondent claims to have explained to complainant: the first thing to appear in the Prospectus is a "Risk Statement" which warns the potential investor as follows: *"the attention of the public is drawn to the fact the shares on offer are unlisted and should be considered as a risk capital investment. Investors are therefore at risk as unlisted shares are not readily marketable and should the company fail, this may result in the loss of the investment to the investor".* (my emphasis)

[26] I have to accept that respondent was aware of this warning and was under a duty, at common law and in terms of The Code, to make full disclosure of the risk in this investment. There is no record of advice that this risk statement was disclosed to complainant and a full explanation of the risk was provided to complainant.

[27] Risk capital refers to funds allocated to speculative activity and used for high-risk, high-reward investments. Diversification is key for successful investment of risk capital, as the

prospects of each investment tends to be uncertain by nature although the returns can be far above average when an investment succeeds. Moreover, an investor needs to ensure that only a portion of total capital is considered risk capital. This is the understanding one can attribute to a reasonably competent FSP in the position of the respondent. Respondent knew that he advised complainant to invest all of her remaining available funds in PIC, which, according to the prospectus is a risk capital investment.

[28] There can be no doubt that complainant was not an investor who could tolerate any risks to her funds in the quest for higher returns. There is no record that respondent explained to complainant that this was a risk capital investment and what is meant by "risk capital investment". If such an explanation was provided by respondent then complainant was not likely to have agreed to invest in PIC. Respondent, on his own version, contravened Section 8 (1) of The Code.

Representative Capacity

[29] Respondent submits that he merely acted as a representative of PIC, who registered him as a representative in terms of Section 13 of the Act. Respondent refers to the terms of his appointment wherein PIC agrees to be responsible for his conduct. He therefore submits that this office should direct the complaint to PIC as product provider.

[30] There is no merit in this. When PIC agreed to be responsible for respondent, they were complying with Section 13 of the Act. The Act does not absolve a section 13 representative from any consequences for poor advice and breaches of The Code nor does it make the principal (PIC) solely responsible. At all material times, and notwithstanding that he acted as a representative, respondent was responsible for the advice given to his client. All

Section 13 representatives are bound by The Code. Besides, respondent accepted the lucrative commission paid by PIC.

Unforeseen Circumstances

[31] Respondent attributes the collapse of the PIC investments to two factors:

a) An unpredictable down turn in the economy; and

b) "possible fraudulent activities".

In September 2011 PIC was placed under business rescue and was subsequently liquidated. This cannot be attributed to a down turn in the economy, nor does respondent provide any evidence to support his view. Equally respondent alleges fraud in vague terms and does not support the allegation with any facts.

[32] One must consider respondent's advice at the time he gave it. When complainant was advised to invest in PIC, it was then a high-risk investment and not suitable for complainant's needs. Respondent cannot now speculate about the causes of the collapse, nor can he rely on hind sight. He cannot rely on the fact that the cause of the collapse was due to factors beyond his control.

[33] It is easy and convenient to impute loss to director mismanagement or other commercial causes. The complainant's loss was not caused by management failure or other commercial influences. If the respondent did his work according to the Act and code, no investment in PIC would have been made, bearing in mind complainant's low tolerance for risk. The cause of loss was the inappropriate advice to invest in a risky product. That the risk actually materialized, for whatever reason, is not the cause of the loss. Otherwise the whole purpose of the Act and Code will be defeated. Every FSP can ignore the Act and Code in providing services to their clients and hope that the investment does not fail.

Then when the risk materializes and loss occurs, they can hide behind unforeseeable conduct on the part of product providers. This will fly in the face of public and legal policy and the provisions of the Act and Code.

[34] The reasonable foreseeability test did not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result: it was sufficient if the general nature of the harm suffered by the complainant and the general manner of the harm occurring was reasonably foreseeable. A skilled and responsible FSP, acting according to the Act and the Code, would not have advised complainant to invest in PIC. The loss suffered by complainant is a result of respondents' inappropriate advice and was reasonably foreseeable by the respondent. See:

STANDARD CHARTERED BANK OF CANADA v NEDPERM BANK LTD 1994 (4) SA 747 (AD)

[35] It was also held in the above case that:

"as to the issues of loss and causation, that although the untrue report issued by the respondent had been a factual cause of the appellant's loss, the test to be applied to the question whether the furnishing of the untrue report had been linked sufficiently closely or directly to the loss for legal liability to ensue was a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all played a part."

It is appropriate to point out that in addition to these factors one has to take into account, in the circumstances of this case, that there is the Act and Code which all FSPs are bound to comply with as well as legal and public policy. All of which factors, when taken into account in this case, show that there is a sufficiently close connection between the respondents' advice and the loss of complainant's capital.

Risk Assessment

[36] Respondent relies on a document titled "RISK ASSESSMENT ON PRODUCT INFORMATION". The document starts with confirming the purpose of the assessment; namely; "*to ensure that the investor understands and accept **all** benefits and risks involved in the investment."* (Emphasis added). The document then calls upon the investor to fill out a questionnaire made up of six questions. All of these questions, with the possible exception of question 4 which advises that these shares are unlisted, have absolutely nothing to do with risks in this product. The questions merely require complainant to acknowledge that she received the prospectus and deals with the possible sale of these shares.

To the extent that respondent relies on this as an assessment of risk, it is entirely useless.

[37] Besides, when he advised complainant to invest in PIC, respondent knew her well and understood her financial circumstances. As a reasonably competent FSP, he must have known that complainant had no tolerance for risk.

The Prospectus

[38] Respondent places much weight on the fact that the prospectus was handed to complainant who read it and acknowledged that she understood it. I take it that as a diligent FSP, respondent must have taken complainant through the prospectus and explained it to her. Respondent knew the complainant and, on the probabilities, did not expect a 55-year-old with no financial experience to read and understand contents of a prospectus.

[39] It will be convenient for me to deal with the prospectus and disclosures at this stage before I move on to a discussion of the rest of the issues.

[40] In order to get a better appreciation of the risks associated with property syndications and the kind of disclosures that should have been made in order to properly advise complainant in terms of the FAIS Act, one has to refer to the statutory disclosures contained in Government Gazette No. 28690, Notice No. 459 of 2006 (Notice 459). These are minimum mandatory disclosures to be made by promoters of property syndicates. By extension, any provider who carries in his portfolio of investment choices, property syndications as a form of investment and recommends the investment to clients must be aware of these and has an obligation to deal with these when advising his or her client. The aim, as set out in the Gazette, is to assist and protect the public when considering these investments.

[41] The Code requires providers to disclose to their client material information to enable consumers to arrive at an informed decision. Section 7 provides as follows:

"(1) Subject to the provisions of this Code, a provider other than a direct marketer, must-

(a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision;"

[42] The material information about this investment is contained in the prospectus and disclosure documents. Before I go to these documents it is appropriate for me to high light some of the provisions of Notice 459:

a) Section 1(a) provides that:

"Statements, presentations and descriptions shall not convey false or misleading information about public property syndication schemes and/or omit material information during the public offer of shares. Material information is information which an investor needs in order to make an informed decision."

b) Section 1(b) states that:

"Investors shall be informed in writing that:

(i) public property syndication is a long-term investment, usually not less than five years;

(ii) there is a substantial risk, in that the investor may not be able to sell his shares should he wish to do so in the future;

(iii) it is not the function of the promoter to find a buyer should the investor wish to sell his shares and that it is the investor's responsibility to find his own buyer."

c) Section 2 (a) requires that investors must be informed that funds received from them prior to transfer will be held in an attorney's trust account. But more importantly, section 2 (b) states as follows:

"Funds shall only be withdrawn from the trust account in the event of registration of transfer of the property into the syndication vehicle; or underwriting by a disclosed underwriter with details of the underwriter; or repayment to an investor in the event of the syndication not proceeding."

(emphasis added)

d) Section 3(c) states that:

"The disclosure document, which is to be dated and signed by the promoter, shall contain a statement of proper due diligence (commercially and legally) with regard to the property and its tenants prior to the unconditional purchase thereof and he/she shall state that this was done and that he/she is satisfied with the results thereof."

e) Where there is a head lease, as in this case, section 7 provides as follows:

"Full details shall be given of:

(a) any head lease agreement and subleases together with the quantum and location of any vacant space covered by such head lease and subleases. Quantum refers to the square meterage and the value involved.

(b) any gross or net rental guarantees supplied by the vendor of the property.

(c) actual leases concluded with full details of space let, duration of leases, rentals, escalation rates for the leases, tenant names and security for leases, expenses recovered from tenants, lease renewal options, rental review periods and vacant space."

[43] Significantly in a poorly completed advice record, provided by respondent, the following appears:

"Die beleggingskapitaal word beskerm deur: Terugkoop ooreenkoms en Hoofhuur ooreenkoms". (the invested capital is protected by a Buy-back agreement and Head lease)

[44] The prospectus states as follows:

"***HEAD LEASE AGREEMENT***

From the investment date, and for five years until the buyback of the investor's shares, the income is secured by a head lease agreement. The income is fixed, providing peace of mind for the investor."

*"**BUY-BACK AGREEMENT***

The guaranteed buy-back agreement ensures that the shares will be bought back from the investors five years from the investment date."

[45] The only way in which this was intended to be read is that the income of 10% to 12.5% is guaranteed and the capital is safe, provided the investor remains in the investment for five years. Accordingly, it is unlikely that respondent informed complainant that this is a high-risk investment where there is a risk of loss of capital.

[46] The whole scheme, and in particular the promised return of 10% to 12.5%, was firmly based on the head lease. This lease agreement is annexed to the prospectus as "C". I accept that respondent read the agreement. This lease is just three pages long with extravagant spacing and can only be described as an excuse for a lease agreement. It is lacking in material information and does not contain the information required by Section 7 of notice 459.

- There is no proper description of the properties being leased;
- How much space is being leased and at what price per square meter is not there;
- The date of commencement is merely stated as "the 3rd month after the registration of the prospectus".
- The rental for the "premises" is merely stated as R13 861 125.00 per month. How this amount is made up and what amount is attributed to each building is not stated;
- There are no financial statements from the lessee, Zelpy 2095 (Pty) Ltd, there was no way of establishing if the lessee was capable of paying the rental in terms of the head lease.
- There was no confirmation that the leased premises were acquired by the company. There is no evidence that respondent checked on this before selling this investment as guaranteed income. In fact, we know that HS20 did not take transfer of these properties. This then calls into question the authenticity of this lease agreement. Small wonder that the lessee ultimately breached the contract and the lessee was even substituted with another company.

- The Buy-Back agreement is annexed to the prospectus as “D”. This is equally a useless document that does not actually give the potential investor any material information. The document merely records that the second to fourth parties give an undertaking to purchase the shares sold by HS20 five years from the “individual purchase date”. Exactly how this was to be achieved is not stated. The bulk of the buy-back agreement is made up of useless boiler plate clauses. Even these clauses are drafted in a careless manner as the document is described, in paragraph 7, as a “lease”. Again, a reasonably competent FSP will question the validity of this agreement.
- There are no financial statements from the second to fourth parties and therefore impossible to work out if the promised guarantees are worth anything.

  We know that both the head lease and buy-back agreements were soon cancelled.
- In paragraph 2 of the prospectus the following appears:

  “*As soon as sufficient funds are received by **“Eugene Kruger & Co Attorneys Trust Account”**, it will be utilized to enable the syndication to **take occupation** of the properties. These funds will be drawn on the instructions of PIC as per agreement between PIC and the investors. The unencumbered properties will be transferred into Highveld Syndication No.20 Ltd.”*

  This is in blatant contravention of section 2 (a) of notice 459. Investor funds had to be secured in the trust account of an attorney. The money can only be paid out of trust upon **registration of transfer** of the property. Not on “occupation” of property. Respondent did not question this at all. He should have been concerned about the safety of his client’s funds and that the company should not be given unfettered access to it. Nor did he bother to find out why or how the company could possibly be excused from complying with notice 459.

In fact, the FSB, for this very reason, cancelled PIC's license. In this regard see Board of Appeal decision in:

Picvest Investments (Pty) Ltd vs Registrar of Financial Services Providers Dated 11th February 2014.

We do know that investor funds were in fact withdrawn from the attorney's trust account. This was not done upon transfer of properties to the company.

[47] On a reading of the prospectus, it is very clear that the promised return of 10% to 12.5% and the further promise of capital preservation was based solely on the viability of the head lease and buy-back agreement. Should any of these contracts fail, or become breached, the promised performance will not be achieved. There was no guarantee that any of the parties had control over what was to happen to these contracts and there was always a risk of failure. This risk was certainly not explained to complainant. This is a contravention of section 7 of the Code.

[48] This brings me to the point, made by respondents, that complainant had the prospectus, read and understood it. On the probabilities, even if she read it, she was not going to understand it. Complainant would require the assistance of a competent FSP to explain the contents to her. This is a responsibility which fell on Respondent.

The Suitability issue

[49] Respondent denies that he breached Section 8 of The Code. Respondent points out that this complaint is about product performance and possibly refers to Rule 4(f). In terms of this rule respondents cannot be held liable over an issue of product performance as they had no control over this. This is an issue to be taken up with PIC.

Respondents are misdirected. This section is about suitability and appropriateness of the advice and is not about product performance. Respondent merely avoided the issue.

Respondent's submission here amounts to saying that his role was merely to present a requested product. He was not there to give advice. This is not the case. Complainant is a lay person and relied on respondent to give her advice as to the appropriateness of the proposed product.

I have already found, for reasons stated above, that this product was not suitable for complainant's needs and financial profile. Respondent contravened the provisions of section 8 of the Code.

E. THE LEGAL FRAMEWORK

[50] This matter must be determined with reference to the following legal framework:

a) The provisions of the Act, in particular section 16 (1) (a);
b) The provisions of the Code, in particular sections 2, 3, 7 and 8;
c) The common law relating to delictual liability; and
d) The common law relating to the contractual relationship between the parties.

F. THE ISSUES

[51] The issues for investigation and determination amount to this:

a) Did Respondent, in advising his client, conduct himself in terms of the General Code, in particular section 2; and
b) Did the Respondent actually comply with the provisions of the following sections of the Code:

   Section 3 (1) (a) (i) and (iii) ; Section 7 (1) (a); Section 8 (1) (a) and (c) and Section 8 (2).
c) Did respondent act in breach of his contract with Complainant; and
d) Did Complainant suffer loss and if so, what was the cause of the loss and the quantum thereof.

G. APPLICATION OF LAW

[52] Bearing in mind the facts found to be proved and the conclusions to be drawn from them, the following findings can be made:

a) Respondent failed to act honestly, fairly, with due skill, care and diligence;

b) Respondent failed to act in the interests of his client and by his conduct compromised the integrity of the financial services industry. Respondent contravened section 2 of The Code;

c) Respondent failed to provide full and frank disclosure of all the material information about the PIC product;

d) Respondent failed to enable complainant to make an informed decision. Respondent contravened section 7 (1) (a) of The Code; and

e) Respondent failed to seek relevant information from complainant and failed to provide appropriate advice. Respondent failed to identify a product that was appropriate to complainant's risk profile and financial needs. Respondent contravened section 8 (1) (a), (b) and (c) of The Code.

[53] The fact that respondent was in breach of the Act and The Code does not mean that he is therefore liable for complainant's loss. There needs to be a breach of contract as well as a claim in delict.

[54] Further, this office as well as the Board of Appeal has consistently found that where a client invests in a product following financial advice by a FSP, there exists a contract between FSP and client. It is an express, alternatively implied term of the contract that Respondent, in carrying out his obligations, will comply with the provisions of the Act and

The Code. For reasons already stated, respondent was in breach of this term. A consequence of this breach was the loss of complainant's capital.

[55] In a number of recent judgements in the high court, it was found that complainants claim is one in delict based on negligence. Once it is established that the respondent gave financial advice, two questions arise:

a) did the respondent comply with his legal duties towards client; and

b) whether in terms thereof the respondent acted wrongfully and negligently.

[56] A reasonably competent FSP in the position of respondent would have done the following:

a) Carried out diligent research to become familiar with the nature of the PIC syndication product he intended to sell. Respondent acknowledged that he was well acquainted with the PIC product, he was required to explain the product to complainant in plain language;

b) As a basic step he was required to read and understand the prospectus and the annexures thereto and explain it to complainant in plain language;

c) Made a point of understanding how PIC intended to pay his commission and investors returns. Respondent provides no details of how he satisfied himself that the company acquired property and in fact leased the premises at a market related rental;

d) Would have noticed that contrary to what was initially stated in the prospectus, investor funds will not be kept in trust but will be paid out to the company "upon occupation" of the property, not upon "transfer of the property".

e) Would have noticed that the shares will not be easy to dispose of, the promoter offered no assistance in disposing of the shares and the onus was placed on the investor to find a buyer (also stated in the prospectus).

f) Would have called for the head lease and buy-back agreement and considered that they were lacking in material information. Respondent was under a legal obligation to draw complainant's attention to this.

[57] Clearly by failing to draw complainant's attention to the above information, respondent failed in his legal duties to his client.

[58] The respondent also acted wrongfully and negligently; he was under a legal duty to make a disclosure of these facts to complainant. Respondent acted negligently in not making full and frank disclosure thereby depriving complainant of the right to make an informed decision.

[59] The respondent must be judged by the standard of a reasonably competent FSP in the same circumstances. Then the inquiry must progress to the next question: would a reasonably competent FSP have advised complainant differently. It is overwhelmingly clear that a reasonably competent FSP would have read and understood the prospectus and would not have advised a 55-year-old, unemployed person, to invest all her available funds in a manifestly high-risk investment where there was a prospect of losing all the capital. The SCA in Durr v ABSA Bank, Schutz JA stated as follows:

"The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity."

"Liability *in delict arises from wrongful and negligent acts or omissions. In the final analysis the true criterion for determining negligence is whether in the particular circumstances of the conduct complained of falls short of the standard of the reasonable person."*

Respondent's conduct fell short of a reasonably competent FSP and Respondent was the factual and legal cause of complainant's loss.

See Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA).

I refer to the following decisions:

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FS)

CENTRIQ INSURANCE COMPANY LTD v OOSTHUIZEN AND ANOTHER 2019 (3) SA 387 (SCA)

ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS 2019 (4) SA 420 (SCA) at p529

H. QUANTUM

[60] Respondent invested R650 000 in the PIC syndication. It is not in dispute that complainant has no prospect of recovering any part of her capital. PIC was finally liquidated.

I. THE ORDER

[61] In the premises, I make the following order:

1. The complaint is upheld;

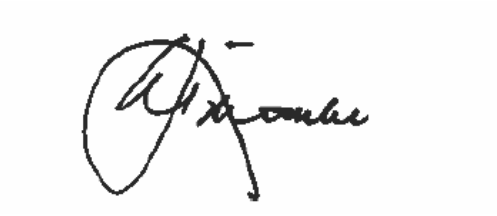
1.1 Respondents are ordered, jointly and severally, to pay complainant an amount of R650 000;

1.2 Interest is payable at 7,75% per annum on the capital amount from a date 14 days from service of this order to date of payment.

2. The complainant is to cede her rights in respect of any further claims to this investment to the respondent.

3. Should any party be aggrieved with the decision, leave to appeal is granted in terms of section 28 (5) (b) (i), read with section 230 of the Financial Sector Regulation Act 9 of 2017.

DATED AT PRETORIA ON THIS THE 14TH DAY OF OCTOBER 2020.



ADV NONKU TSHOMBE

OMBUD FOR FINANCIAL SERVICES PROVIDERS